IN THE

Supreme Court of the United States

October Term, 1976
No. 75-1947

RICHARD A. BERRY,

Petitioner,

v.

SCREEN EXTRAS GUILD, INC., a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BLEED THROUGH

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-1247

RICHARD A. PERKINS,

Petitioner,

vs.

SCREEN EXTRAS GUILD, INC., a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Statement of the Case.

In order for the Court to fully understand the background of this case, it is necessary for Respondent to review the history of the litigation involving Petitioner.

This Petition is another step in a long and complex series of litigation that has been in effect since 1968 and has involved four District Court Judges, three appeals to the Court of Appeals and two Petitions for Certiorari to this Court. All the litigation is completed except for the single issue of whether adequate attorney's fees were awarded to Petitioner.

A brief history of this litigation involving the Plaintiff, Ed Kerr and the Screen Extras Guild, H. O'Neil Shanks and two other officers of the Guild is necessary in order to properly present the issue of adequacy of attorney's fees to Petitioner.

Ed Kerr (Petitioner's former client, and Plaintiff in all the cases) was involved in three separate actions in the District Courts, as well as a prior State action involving claims by Kerr as against the Guild and three officers of the Guild.

One case involved an appeal before the Court of Appeals (466 F.2d 1271 (9th Cir. 1972)) on a claim that the three officers had received salaries and expenses from the Guild under an agreement which had not been presented to the membership for a referendum vote as required by the Constitution and Bylaws of the Guild and therefore, the monies were received in violation of Title V of the Labor Management Reporting and Disclosure Act (29 U.S.C. 501). The District Court had originally denied relief to Kerr as well as denying attorney's fees to Petitioner. The Court of Appeals reversed the District Court and remanded the case to the District Court for trial on the basis that the amounts of salary and expenses were to be returned to the Guild and that a portion of the attorney's fees that was expended by the Guild to its attorneys for representing the individual Defendants was to be charged to the individual Defendants and that Petitioner was to be awarded attorney's fees. The case was remanded to the District Court and Petitioner moved for withdrawal as attorney of record for Kerr. Petitioner petitioned for attorney's fees and after a hearing and a trial, was awarded $20,000.00 by the District Court. The remaining issues were resolved after trial and Kerr's new attorney was awarded $2,500.00 by the District Court. A Judgment was entered as against the three officers regarding the return of salaries and expenses, as well as the amount of attorney's fees apportioned to them that were expended by the Guild in defending the case.

Regarding the Title V case (68-1352-FW), Petitioner received $20,000.00 as attorney's fees which has been paid by the Guild.

In Case No. 69-1954-HP (the First Disciplinary case), the issue involved a charge filed by a member of the Guild against Kerr, claiming that Kerr had caused to be published an article in the Daily Variety (an entertainment industry trade newspaper), a statement regarding the internal activities of the Guild. The Guild did not process the charges and based on representation by the Guild's attorney before the District Judge, the charges were not heard and Kerr was never required to appear before a trial board of the Guild. The District Court, based on this representation of Counsel, dismissed the Complaint on the basis that there were no further issues to be tried and that under Title I, Petitioner was not entitled to attorney's fees. An appeal was taken and the Court of Appeals (466 F.2d 1267 (9th Cir. 1972)), reversed the District Court and remanded the case for trial and held that Petitioner was entitled to attorney's fees and that Kerr was entitled to a trial regarding any damages. The case was remanded and Petitioner withdrew as attorney for Kerr. Petitioner petitioned the District Court for attorney's fees. The District Court granted Petitioner $6,000.00 attorney's fees. Petitioner appealed from this Judgment of the District Court (69-1954-HP) on the basis that the $6,000.00 was an inadequate amount to award as attorney's fees. It should be pointed out that following the decision of the Court of Appeals in 69-1954-HP, the Guild filed a Petition for Certiorari before the United States Supreme Court on the issue as to whether attorney's fees were allowable under Title I of the Act. While the Petition was pending before this Court, the case

of *Hall v. Cole*, 412 U.S. 1 (1973) was decided where this Court held that, under proper circumstances, attorney's fees could be awarded by a District Court in a Title I action.

The Court of Appeals for the Ninth Circuit in the First Disciplinary case, which was consolidated with the current case, remanded the case to the Court for specific Findings of Fact as to why the District Court found that $6,000.00 constituted reasonable attorney's fees.

In the third case referred to as 79-259-LTL (Second Disciplinary case) Kerr filed suit against the Guild and the same officers on the basis that a charge had been filed with the Guild based on the same article in the Daily Variety. This charge regarded Kerr's status as a member of the Board of Directors of the Guild. The prior case (69-1954-HP) was based on the charge concerning his membership in the Guild. Prior to the case coming to trial, the Guild's attorney represented to the Court that the charge would not be processed regarding Kerr's position as a member of the Board of Directors of the Guild. Such charges were never processed; Kerr did not have to appear before any trial board of the Guild; and he finished his full term of office as a member of the Board of Directors without any disturbance or interruption by the Guild or any of its officers. This issue was presented to the District Court who found that there was no violation of Title I and entered a Judgment of Dismissal of the Complaint and held that Petitioner was not entitled to attorney's fees.

Petitioner and Kerr appealed from the Judgment entered by the District Court. However, prior to any

briefs being filed, *Hall v. Cole* was decided by this Court.

The Guild agreed to a Stipulation that the Judgment of the District Court in 70-259-LTL could be reversed and vacated and remanded to the District Court. It was the position of the Guild that in view of *Hall v. Cole,* there was no point in having the appeal heard by the Court of Appeals with the expense involved in filing briefs and arguments and then to have the Court of Appeals remand to the District Court to review the case in light of the Supreme Court determination in *Hall v. Cole.* The Guild's position was that it was preferable to have the District Court reconsider the matter based on the decision of *Hall v. Cole,* and determine whether the District Court decision would remain the same in view of the resolution of the issue as to whether attorney's fees were allowable in a Title I action as was determined by this Court in *Hall v. Cole.*

Upon the Stipulation to Remand to the District Court, Petitioner withdrew as attorney of record for Kerr, and petitioned the District Court for attorney's fees. The Guild requested reconsideration on the basis that in view of *Hall v. Cole,* there was still no merit to Kerr's case; that the original Judgment of the District Court was correct which was determined following a trial and based on Findings of Fact and Conclusions of Law; that although the case was properly reconsidered in view of *Hall v. Cole,* the original Judgment should not be changed and the District Court should enter Judgment for the Guild, and to deny attorney's fees to the Petitioner.

The District Court upon reconsideration of its original Judgment, denied attorney's fees to Petitioner.

The Court of Appeals for the Ninth Circuit affirmed the District Court on the basis of the Findings of Fact of the District Court in exercising its discretion in concluding that the Second Disciplinary case which was prosecuted by Petitioner conferred no substantial benefit upon the Guild's members. In addition, the Court of Appeals stated that there were problems in determining whether Kerr may be characterized as "successful" or not. The District Court found against Kerr in all respects and Kerr had not prosecuted any appeal from that decision. The Court of Appeals further concluded that they do not have to determine whether Kerr was a "successful plaintiff" because the Court of Appeals found that prosecution of the Second Disciplinary case did not confer a substantial benefit upon the Guild's members. The Court of Appeals held that the primary benefit had already been conferred upon the members of the Union by the First Disciplinary case.

REASONS FOR DENYING THE WRIT.

1. The Petitioner urges that there is some necessity for this Court to determine whether *Hall v. Cole* draws a distinction under a Title I case as to whether the prosecution by the Union involves the rights of a member as a member, or the rights as a member to hold a Union office, and whether the substantial benefit test to membership also applies to a Union's action concerning the status of a Union member as a Union officer.

Petitioner in setting up this artificial issue alleges that there is some conflict between the Court of Appeals on this issue and clarification and a determinative decision is required by this Court.

The Court of Appeals did not draw any distinction nor did the District Court between Kerr's status as a member regarding a disciplinary procedure by the Union, or Kerr's status as a member of the Board of Directors regarding a disciplinary action by the Guild under Title I. The Court of Appeals upheld the District Court in its exercise of discretion in making a determination of fact that the prosecution by Kerr in the Second Disciplinary case did not render any substantial service or benefit to the membership of the Guild in view of the fact that the First Disciplinary case was determined and Petitioner had received an award of attorney's fees in the First Disciplinary case. The Court of Appeals followed the basic proposition that on a question of fact it is within the discretion of the District Court to make its determination as to whether on a factual matter, the prosecution of the Second Disciplinary case did or did not confer a substantial benefit upon the Guild's members.

Petitioner urges this Court to grant the Writ and emphasizes that there was a Stipulation for Order of Remand back to the District Court following the First Appeal in the case which somehow requires the granting of attorney's fees under *Hall v. Cole.*

In the first Judgment entered by the District Court, the Guild and Kerr through Petitioner entered into the following stipulation

> "The judgment of the District Court is vacated and the cause is remanded for further proceedings not inconsistent with *Hall vs. Cole,* .... U.S. .... (41 U.S. L.W. 4658, May 21, 1973)."

It was consistently the position of the Guild before the District Court that the reason for the Stipulation to Remand the case was to have the District Court review its previous Findings of Fact and Conclusions of Law and Memorandum of Decision in light of *Hall v. Cole,* in order to avoid the expense and time of filing briefs before the Court of Appeals and having the Court of Appeals possibly remand the case to have the District Court review its decision under *Hall v. Cole.* It was more practical and less costly to the parties, in view of *Hall v. Cole,* to remand by Stipulation and have the District Court review its original Judgment, Findings of Fact, and Conclusions of Law. Petitioner would make too much of this Stipulation and seems to argue that based on the Stipulation for Remand, the District Court had to find that there was damage to Kerr and a violation of Title I and that Petitioner is entitled to attorney's fees.

The Stipulation contains no such requirement, elements or admissions and the District Court considered the Stipulation on Remand upon the basis urged by the Guild and clearly set forth in the Order of Remand.

BLEED THROUGH

The District Court in its original Memorandum of Decision stated as follows:

> "The Court finds that Plaintiff has failed to sustain his burden of proof that any violation of any right guaranteed by a union member by the law has occurred; that any action by Defendants, or either of them, was done maliciously or oppressively or as a result of any actionable conspiracy; that Plaintiff has suffered any damage or that the action taken by Plaintiff herein has resulted in any benefit to the Defendant union compensable by way of an award of litigation expenses or attorney's fees." [Cl. Tr. Vol. I, pp. 236, 242, and 247—74-2034].

The Findings of Fact and Conclusions of Law reflected the Memorandum of Decision and specifically at paragraph XII, the District Court found as follows:

"XII

> Plaintiff has not rendered any benefit to Defendants Screen Extras Guild, Inc., nor to the members of said Defendant labor organization by the action taken by Plaintiffs herein that is compensable by way of an award of litigation expenses or attorney's fees."

The guidelines as set forth by this Court in *Hall v. Cole*, are that attorney's fees under Title I of the Act are within the traditional and equitable powers of the Federal Court and the statute itself did not prohibit the granting of attorney's fees in a case where such fees are warranted. This Court set forth two separate criterias for the granting of attorney's fees in a Title I suit. One criteria is whether the Union's actions were based on malice or bad faith. The other

basis is where the litigation has conferred substantial benefits to a class of beneficiaries which would be the union membership.

It is clear from *Hall v. Cole* that a Plaintiff's attorney is not entitled to attorney's fees as a matter of right simply by bringing a lawsuit under Title I. The District Court, in order to grant attorney's fees, must find that the Plaintiff has prevailed on at least one of the two criterias set forth above, namely whether the actions of the Union were based on malice or bad faith, or secondly, where the litigation has conferred substantial benefits to the membership of the Union.

Since the District Court found against Kerr on both grounds and made specific Findings of Fact, after a trial that Kerr had not rendered any benefits to the Guild or to its members and that there was not any malice or bad faith, then Kerr was not granted any relief and did not prevail in the suit. On this basis Petitioner was not entitled to attorney's fees.

The District Court upon hearing evidence, made a specific finding following the trial: that Kerr would not prevail; that he had not suffered any damages; that there was no bad faith or malice, or that there were no benefits conferred on the membership of the Union.

It is clear that Kerr did not suffer any damages in this matter since the charge regarding his position on the Board of Directors was never challenged. The charges were filed and then dropped and never processed before a Trial Board.

Any benefits that might have been conferred on the membership by a prosecution of Title I rights

by virtue of Kerr's lawsuit, was established in 69-1954-HP (the First Disciplinary case), and the District Court, by an award of attorney's fees to Petitioner in the amount of $6,000.00.

The District Court upon denying attorney's fees and reaffirming its original opinion, found no reason to change its previous Findings of Fact and Judgment, in view of *Hall v. Cole.* The District Court stated that it was never the opinion of the District Court that attorney's fees were not allowable in a Title I action, even prior to *Hall v. Cole.* The District Court specifically pointed out that it was denying attorney's fees on the basis that Plaintiff has failed to prove his case and there was no Judgment entered against the Guild on the merits of a Title I violation.

Although Petitioner makes many assertions in his Petition, there is no doubt that the Findings of Fact are supported by evidence that establishes that Kerr did not incur any actual or imminent injury or any loss or damage because of the charges filed against him regarding his position on the Board of Directors of the Guild. He served his full term as a Board member without any interference from the Guild. The evidence establishes clearly that the removal charges were not held before any Trial Committee, or the Board of Directors or the Guild membership. It is difficult to understand how the District Court could find other than it did, in denying relief to Kerr. See *Baron v. North Jersey Newspaper Guild,* 342 F.2d 423 (C.A. 3d 1955); *Carroll v. Associated Musicians of Greater New York,* 360 N. 2d 574 (C.A. 2d 1963).

It is clear from the decision of this Court in *Hall v. Cole,* that in order for a plaintiff's attorney to

be entitled to attorney's fees under Title I, that there must be a finding by the Court that Title I has been violated and by virtue of such violation, there was either malice or bad faith or that a substantial benefit was conferred upon the membership of the Union. Kerr and Petitioner failed to prove either of the allegations and, therefore, failed to meet the test of *Hall v. Cole.*

The District Court, in reviewing the Petition for Attorney's Fees and upon reconsideration of its original Judgment, instructed Petitioner to file all prior cases and documents involving all the cases concerning Kerr and the Guild which were before the District Courts. In its denial of attorney's fees, the District Court, in addition to affirming its original decision, set forth that Petitioner had received substantial attorney's fees in the total sum of $26,000.00, in the other two cases, and that the Guild was not a union with a large membership or a substantial treasury and that the litigation had already cost the Guild a substantial amount of money. It is clear from *Hall v. Cole* that the approach of the District Court was proper. This Court particularly referred to the fact that the District Court should review the ability of the Union to pay as compared to the benefits conferred to the membership. There must be a proper balancing in order to award attorney's fees and to determine the amount of attorney's fees. The principle of *Hall v. Cole* is that although there may be a benefit to the membership, it does not serve the membership any useful function to penalize the Union by awarding substantial attorney's fees which comes out of the Union treasury and, therefore, injures the entire membership. It is a case of benefiting the Union membership,

on one hand, by virtue of bringing the Title I action and then punishing the membership by depleting the Union treasury by awarding substantial attorney's fees. It is clear that this Court intended that a District Court, in allowing attorney's fees under Title I, must review all the circumstances and to reach a balance between actual benefits to the membership and the financial costs to the Union. In this case, the District Court reviewed the financial records of the Guild and reviewed the total amount paid by the Guild on attorney's fees. The Guild paid $20,000.00, and is obligated for an additional $6,000.00, to Petitioner. The District Court made a correct determination that Petitioner had received adequate compensation concerning representation in the cases involving Kerr and the Guild.

Conclusion.

For the above-stated reason, Respondent requests that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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